LORI MALAYSIA BHD

v.

ARAB-MALAYSIAN FINANCE BHD

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
EDGAR JOSEPH JR FCJ
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 02-6-94]
26 MAY 1999

CONTRACT: *Illegality - Companies Act 1965, s. 67 - Whether contract in breach of s. 67(1) enforceable - Effect of provision in s. 67(6) allowing company to recover amount for which it becomes liable - Whether s. 67(6) protects company only or third parties also - Companies Act 1965, s. 67(1), (6) - Contracts Act 1950, s. 24*

CIVIL PROCEDURE: *Costs - Personal liability of receivers - Allegations of criminal conduct in affidavits - Whether sufficient grounds - Whether costs order should be upheld*

The respondent finance company ('the lender') obtained an order under s. 256 of the National Land Code 1965 ('the Code') for the sale of certain lands ('the land') which were charged by the appellant company ('the borrower') as security for a loan of RM4.3m ('the loan'). The judge also made orders for costs against the receivers personally on the basis that they had made allegations of criminal conduct in their affidavits without proper evidence.

The borrower appealed against the order for sale on the ground that the loan contravened s. 67 of the Companies Act 1965 ('the Act') – being in the nature of financial assistance in the purchase of its own shares – and was therefore illegal and void. The borrower argued that the judge was wrong: (i) in deciding the plea of illegality purely on the affidavits and documents instead of trying it in open court; and (ii) in not finding that the loan and charge were illegal, void and unenforceable being in contravention of s. 67 of the Act and s. 24 of the Contracts Act 1950 ('the Contract Act'.)

The main issue before the court was whether a breach of s. 67(1) of the Act carries any civil consequences, *ie*, whether a transaction made in breach of s. 67 is unenforceable at law in view of s. 24 of the Contracts Act and the decision of the Supreme Court in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang* ('the *Chung Khiaw Bank* case'), or whether the transaction is saved by s. 67(6) of the Act, which allows the company to recover "any amount for which it becomes liable" as a result of the tainted transaction.

Held:

Per Edgar Joseph Jr FCJ

[1] Where allegations made in affidavits are credibly denied by opposing affidavits, the judge must ignore the allegations in the absence of oral evidence or cross-examination. Furthermore, where the statement is made based on information and belief, it should be ignored unless the court can ascertain its source and it is corroborated by a person with first-hand knowledge. In this case, the judge was amply justified in resolving the conflict of evidence on affidavits as the allegations of illegality were mere innuendos which flew in the face of the documentary evidence.

[2] The crux of the Supreme Court's reasoning in finding against the creditor bank in the *Chung Khiaw Bank* case was: (i) a transaction prohibited by s. 67 of the Act was void in view of s. 24 of the Contracts Act, which the court was bound to give effect to, and thus the court could not follow the common law trend in being slow to strike down illegal contracts; (ii) the protection afforded by s. 67(6) of the Act was to the company only, and not its creditors, and was limited only to enabling the company to recover loans given by it; and (iii) the bank had knowledge of the illegality.

[3] The *Chung Khiaw Bank* case was decided *per incuriam* because of the court's failure to construe the all-important five words "for which it becomes liable" appearing in s. 67(6) of the Act. As a result, the court took a wrong turn and placed undue stress on s. 24 of the Contracts Act and held that because of the Bank's knowledge of the illegality and the nature of the transaction, the Bank's claim failed.

[4] Whilst at common law, a contract in breach of a statutory prohibition is in general void for illegality, this is subject to any contrary intention manifested by the statute. Section 67(6) of the Act creates an important exception to s. 24 of the Contracts Act and is the statutory recognition that an illegal security given by a company to finance the purchase of its own shares is not avoided.

[5] The trend shown by common law courts in being slow to strike down commercial contracts for illegality is a sensible one, which should be followed by our courts and thus incorporated as part of our common law.

[6] The Supreme Court's finding in the *Chung Khiaw Bank* case that s. 67 of the Act was confined to the protection of the company only was contradicted by a wealth of respectable common law authorities. Section 67(6) of the Act is intended for the protection not only of a company but also of its shareholders, creditors and the public generally.

[7] Whilst it is clear law that costs are at the discretion of the court, the grounds on which the orders for costs were made against the receivers could be disputed. The fact that they had relied on legal advice should be held in their favour rather than against them. The orders for costs had to be set aside.

[Appeal dismissed.]

Case(s) referred to:

Batu Pahat Bank Ltd v. Official Assignee [1933] AC 691 ***(aff)***
Bunt v. Hallinan [1985] 1 NZLR 450 ***(refd)***
Cantrans Services Ltd v. Clifford [1974] 1 MLJ 141 ***(foll)***
Carney v. Herbert [1985] 1 All ER 438 ***(refd)***
Central Securities (Holdings) Bhd v. Haron Mohamed Zaid [1979] 2 MLJ 244 ***(refd)***
Chung Khiaw Bank v. Hotel Rasa Sayang [1990] 1 CLJ 675 ***(not foll)***
Cope v. Rowlands 150 ER 707 ***(refd)***
Curtis's Furnishing Stores Ltd v. Freedman [1996] 2 All ER 955 ***(refd)***
De Montmorency v. Pratt (1849) 12 I Eq R 411 ***(refd)***
Delacherois v. Wrixon (1850) 2 Jr Jur 66 ***(refd)***
Eng Mee Yong v. Letcumanan [1987] 3 WLR 413 ***(foll)***
Ex p Brown (1888) 20 QBD 693 ***(refd)***
Gherulal Parakh v. Mahadeodas (1959) Supp SGR 406 ***(foll)***
Heald v. O'Connor [1971] 1 WLR 497 ***(refd)***
In re JL Young Manufacturing Ltd Co (1900) 2 Ch 753 ***(foll)***
Kan Yeow Weng v. Keng Soon Motor Finance [1962] MLJ 391 ***(refd)***
Kidurong Land Sdn Bhd & Ors v. Lim Gaik Hua & Ors [1990] 1 CLJ 687 ***(not foll)***
Kok Hoong v. Leong Cheong Mines Ltd [1964] 1 All ER 300 ***(refd)***
Littlewood v. George Wimpey & Co Ltd [1953] 2 All ER 915 ***(refd)***
Menaka v. Lum Kum Chum [1977] 1 MLJ 91 ***(refd)***
Mookapillai & Anor v. Liquidator, Sri Saringgit Sdn Bhd & Ors [1981] 2 MLJ 114 ***(refd)***
O'Kelly v. Gregg (1838) Jo & Car 76 ***(refd)***
Payne v. Lamb (1844) 8 I Eq R 517 ***(refd)***
Phoenix Insurance v. Adams [1987] 2 All ER 152 ***(refd)***
Re a Bankruptcy Notice (1924) 2 Ch D 76 ***(refd)***
Re Chapman (1896) 1 Ch 323 ***(refd)***
Re Doolan (1843) 2 Con & Law 232 ***(refd)***
Re Ferguson, ex p Thome (1969) 14 FLR 311 ***(refd)***
Re Hill (1896) 1 Ch 962 ***(refd)***
Re Mahmoud & Ispahani [1921] 2 KB 716 ***(refd)***
Scott v. Brown Doering, McNab & Co [1942] 1 All ER 224 ***(refd)***
Selangor United Rubber Estates Ltd v. Cradock (No 3) [1968] 2 All ER 1073 ***(refd)***
Skelton v. South Auckland Blue Metals Ltd [1969] NZLR 955 ***(refd)***
St John Shipping Corporation v. Joseph Rank Ltd [1956] 3 All ER 683 ***(refd)***
Tan Lay Teck v. Sarjana Sdn Bhd & Ors [1997] 3 CLJ 421 ***(aff)***
Tay Bok Choon v. Tahansan Bhd [1987] 1 WLR 413 ***(foll)***

Trevor v. Whitworth (1887) 12 App Cas 409 ***(refd)***
Victor Battery Co Ltd v. Curry's Ltd (1946) Ch D 242 ***(refd)***
Vita Food Products Inc v. Unus Shipping Co Ltd [1993] 1 All ER 513 ***(refd)***
Wai Hin Tin Co Ltd v. Lee Chow Beng [1968] 2 MLJ 251 ***(refd)***
Wallersteiner v. Moir [1974] 3 All ER 217 ***(refd)***
Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd [1978] 139 CLR 410 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3
Companies Act 1965, ss. 67(1), (3), (6)
Companies Ordinance (No 49 of 1940), ss. 47, 48
Contracts Act 1950, ss. 2(g), 24, 66
Moneylender's Ordinance 1951, s. 8(c)
National Land Code 1965, ss. 254(3), 256(3), 257(1), (2), (3)

Companies Act 1929 [UK], s. 45(1)
Companies Act 1948 [UK], s. 54
Contracts Act [India], s. 23

Other source(s) referred to:
Law of Contracts in Malaysia and Singapore, Prof Visu Sinnadurai, 2nd edn, pp 357-366
Kerr on Receivers and Administrators, 17th edn, p 210
Osborn's Concise Law Dictionary, 8th edn, p 200
Principles of Company Law, Gower, 5th edn, p 237
Principles of Corporate Law, Ford, 1992, 6th edn, p 226, para 867
Restitutionary Remedies in Illegal Agreements, Varsha L Doshi, 1998, pp 45-55
Section 67 of the Companies Act: A Hornet's Nest? Lai Ching Sum, [1992] 2 MLJ xi

For the appellant - KS Narayanan (WK Leong & Saranjit Singh with him); M/s Riza Leong & Partners
For the respondent - Shahul Hamid Amiruddin (Khairuzzaman Muhammed with him); M/s Albar Zulkifly & Yap

[Appeal from High Court, Shah Alam; Originating Summons No: 24-130-1992]

Reported by Anne Khoo

JUDGMENT

Preliminary

This appeal is from an order of the High Court, Shah Alam, allowing an application by way of Originating Summons by Arab-Malaysian Finance Berhad, the respondent herein ("the Lender") for an order under s. 256 of the National Land Code 1965, ("the Code") for the sale of certain land comprised in LO. No. 28, Jalan 223, Section 20, Q.T. (R) 6300 Bandar Petaling Jaya ("the Land") which was the subject matter of a charge registered in its favour

by Lori Malaysia Berhad, the Appellant herein ("the Borrower Company") given by way of security for a loan of RM4.3 million ("the Charge"). The Judge had, of course, made the order aforesaid because he was satisfied that the Borrower Company had failed to satisfy him of the existence of "cause to the contrary" as required by s. 256(3) of the Code.

The Background Facts

The undisputed facts were that in the midst of a take-over battle, the directors of the Borrower Company had on 19 November 1991 obtained an order of the High Court appointing an Interim Receiver to protect the Borrower Company's assets and it is he who resisted the Originating Summons to enforce the Charge, upon the ground that the loan aforesaid and the charge were granted in contravention of s. 67 of the Companies Act 1965 ("the Act"), read with s. 24 of the Contracts Act 1950. In particular, the case for the Borrower Company was that the loan aforesaid had been granted in the nature of financial assistance for the purpose of, and in connection with, the purchase by Technivest Sdn. Bhd. ("Technivest") from Majlis Amanah Rakyat ("MARA"), of its shares in the Borrower Company.

Of the Borrower Company's entire paid up capital of 10,633,920 shares, MARA owned as much as 10,475,500 shares ("the shares") or, in other words, approximately 98% of the Borrower Company's entire paid up capital. The 1 November 1989 saw MARA appointing Technivest to manage the Borrower Company.

The contemporary correspondence showed that MARA had by a letter dated 21 September 1989 offered to sell the shares to Technivest, pursuant to a proposal by Technivest's Chairman Dato Bashah Nordin that the Borrower Company be privatised. Technivest responded by letter dated 28 September 1989 accepting the offer.

To acquire the shares, Technivest needed money, so it applied by letter dated 30 October 1989, signed by its Chairman Dato Bashah Nordin, addressed to the Lender for a loan facility to complete the purchase. The Lender replied by letter dated 30 November 1989 to the Borrower Company offering a term loan of RM4.3 million ("the first offer"). The Borrower Company had stated to the Lender that the purpose of the loan was "to pay MARA for the settlement of Lori Malaysia Berhad's liabilities with MARA and its subsidiaries". As for the security for the loan, there was to be a charge over the Land, a debenture over all the present and future assets of the Borrower Company and Technivest and joint and several guarantees from the Borrower Company's Directors Dato Bashah Nordin, Ismail Affandi, Mustapha Hamat, Omar Abu Bakar and a corporate guarantee from Technivest.

Then, on 1 December 1989, a formal sale and purchase agreement ("the Sale and Purchase Agreement") was prepared by the legal firm of Messrs. Abdullah and Zainuddin on behalf of MARA, and duly executed by the authorised signatories in MARA and Technivest. It provided that the purchase price was to be RM130,000. It further provided by clauses 5.2 and 5.3 that Technivest would pay or cause to be paid to MARA, the sum of RM4,329,320 in full and final settlement of loans which MARA had made to the Borrower Company together with the sum of RM117,000, being the balance purchase price for the shares, whereupon, MARA was to hand over the certificates and transfers for the shares and letters of resignation of their nominated directors on the Board of the Borrower Company.

Next, on 11 January 1990, the Managing Director of the Borrower Company Encik Ismail Affandi wrote to the Lender enclosing a copy of the Sale and Purchase Agreement and asked for an undertaking that the RM4.3 million would be forthcoming to pay MARA for the settlement of its liabilities.

Of course, the approval of the Foreign Investment Committee was required for the transaction, and this was duly obtained in May of 1990.

In the midst of these events, there occurred an event of critical substance – MARA had been advised by their Solicitors, by letter dated 14 June 1990, that the proposal by the Borrower Company to obtain finance to settle its obligation under the Sale and Purchase Agreement would violate s. 67 of the Act. The attention of the Lender's Solicitors was then directed to this letter. In the upshot, the Lender wrote to the Borrower Company that their offer letter dated 20 November 1989 was withdrawn and, as such, null and void.

The parties stood on common ground in saying and, indeed the Judge so found, that the raising of the RM4.3 million by a charge to be given by the Borrower Company over the Land would have amounted to direct financial assistance for the purchase of the shares in the Borrower Company because the terms of the Sale and Purchase Agreement clearly provided that unless this money was first paid MARA was not going to transfer the shares.

After a lapse of some three months, the Borrower Company submitted a fresh application for a fresh term loan and flexi loan facilities of RM4.3 million and RM0.5 million

The Judge found, and we agree, that the Borrower Company must have represented to the Lender that the RM4.3 million was required as working capital because in the Lender's letter dated 25 September 1990 for this loan ("the second offer") the purpose of the facility was stated to be "For the working capital of the company". Then, on 30 September 1990, the Directors of the Borrower Company passed a resolution accepting the second offer and agreeing to give the required securities which included the charge over the Land.

The Judge inferred – and we agree – that in connection with the second offer the Lender would have required to be furnished with evidence that the proposed new loan was not going to be used for a purpose in contravention of s. 67 of the Act. In this regard, in its search for proof, the Lender had obtained confirmation in writing from the Borrower Company by letter dated 5 October 1990 addressed to it, stating categorically, that all the shares which were the subject matter of the Sale and Purchase Agreement had already been transferred by MARA to Technivest on 15 September 1990.

At this point, we would interrupt the narrative of events, to observe that the Judge found, and we agree, that their letter of confirmation dated 5 October 1990, from MARA to the Lender, was critical because it showed that on that date there was no agreement in existence between the Borrower Company and the Lender for the provision of any moneys whatsoever. What was even more important, as the Judge observed, was that when the Borrower Company's Directors resolved to accept the second offer on 30 September 1990, all the shares in the Borrower Company had already been transferred to Technivest, some fifteen days earlier. This point was made even more emphatic when MARA wrote a letter dated 9 October 1990 to the Lender, which being freely translated, was in the following terms:

TRANSLATION
IBU PEJABAT MARA

Bil. MARA: US/3212.
Tarikh: 9th Oktober, 1990.

Arab-Malaysian Finance Berhad
10th Floor, Bangunan Arab-Malaysian
No. 55, Jalan Raja Chulan
50200 Kuala Lumpur

Tuan,

SALE OF 10,475,980 SHARES IN LORI MALAYSIA BERHAD

Gladly we confirm that our side had sold 10,475,980 shares in Lori Malaysia Berhad to Technivest Sendirian Berhad.

2. We also confirm that the implementation of the above sale has already been completed and we have received full payment as specified in the Sale and Purchase Agreement as executed.

Thank you.

"BERKHIDMAT UNTUK NEGARA"

t.t.

(ROZLAN BIN MOHD IDRIS)
Unit Syarikat
MARA Kuala Lumpur

It was only after the above confirmation that the formal Loan Agreement was executed – that is to say, on 11 October 1990 – by which time the Borrower Company had become a subsidiary of Technivest.

It is unnecessary to go into the contents of the Loan Agreement for they are ample extracts from it in the Judgment of the Court below. Suffice it to say, that Section 3.01 thereof contained representations and warranties by the Borrower Company which fortified the Judge's conclusion that the second offer was free from the taint from which the first offer suffered. For example, para (1) thereof stated "the acquisition by TSB (Technivest) of shares in the Borrower Company from MARA has been completed and Technivest is the registered shareholder of the said shares". Then, as regards the purpose of the loan, Section 4.02 of the Loan Agreement provided:

> The whole proceeds of the Loan shall be applied by the Borrower exclusively for the Borrower's working capital.

Both the Charge and the Loan Agreement were duly and properly executed on the same day, that is to say, on 11 October 1990.

On 19 October 1990, the Borrower Company issued a draw down notice in writing requiring payment of the full amount of RM4.3 million to be made to the Solicitors for the Borrower Company Messrs. Nordin Hamid & Co. for onward transmission to MARA. The draw down notice affirmed the truth and accuracy of the representations and warranties aforesaid.

The Lender complied and on 22 October 1990 dispatched a cheque for RM4.3 million in favour of the legal firm of Messrs. Nordin Hamid & Co.

In the events which followed, the Borrower Company had defaulted, whereupon, the Solicitors for the Lender, by letter dated 9 September 1991 recalled the entire facility and, then, on 27 September 1991, the Lender served upon the Borrower Company the statutory notice in Form 16 D under the Code after which the Lender commenced the proceedings by way of Originating Summons to enforce the Charge. The Borrower Company entered appearance through its Interim Receiver who through his representative Mr. Fernandis, put in an affidavit in opposition, alleging a breach of s. 67 of the Act, read with s. 24 of the Contracts Act, as particularised above.

In the event, as we have stated at the outset, the Judge being satisfied that the Borrower Company had failed to satisfy him of the existence of "cause to the contrary" within the meaning of s. 254(3) of the Code, allowed the Lender's Application, by way of Originating Summons. It is from that judgment that the Borrower Company, through the Intervener, had appealed to this Court.

Before us, broadly stated, the grounds upon which Counsel for the Borrower Company attacked the Judgment of the Court below were twofold:

(1) It was said that the Judge was wrong in Law in determining the plea of illegality founded upon a breach of s. 67 of the Act, read with s. 24 of the Contracts Act, 1950, purely upon the affidavits, the contemporary documents and correspondence and the submissions of Counsel on both sides, when the circumstances of the case were such that only after a full investigation at a trial in Open Court, could the issue of illegality have been regularly tried. Accordingly, it was said the Judge ought to have exercised his discretion and converted the Originating Summons into a Writ Action.

(2) Alternatively, it was contended that if it was open to the Judge to have dealt with the case in the manner he did, he was wrong in Law, in holding, as he did in fact hold, that the loan facility arrangements pursuant to which the loans had been granted by the Lender to the Borrower Company was not in the nature of financial assistance given directly or indirectly for the purpose of or in connection with the purchase by Technivest from MARA of MARA's shares in the Borrower Company, and therefore, not in contravention of s. 67 of the Act, read together with s. 24 of the Contracts Act. On the contrary, the Judge should have held that the loan transaction and the charge were illegal, void and unenforceable as having been entered into in contravention of s. 67 of the Act, read with s. 24 of the Contracts Act, and dismissed the Originating Summons.

Was The Issue Of Illegality Regularly Tried?

The Law on the approach of the Court of first instance in evaluating and resolving a conflict of evidence on affidavit was well captured by the Privy Council in *Eng Mee Yong v. Letchumanan* [1987] 3 WLR 413 and in *Tay Bok Choon v. Tahansan Bhd.* [1987] 1 WLR 413.

In the first of these cases – *Eng Mee Yong* – Lord Diplock delivering the advice of their Lordships of the Board said this (at p. 381 D):

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflict of evidence on affidavit, this does not mean that he is bound *to accept uncritically,* as raising a dispute of fact which calls for further investigation, every statement on an affidavit however *equivocal, lacking in precision, inconsistent with undisputed contemporary document or other statements by the same deponent, or inherently improbable itself may be.* (Italics supplied)

In the second of these cases – *Tahanson* – Lord Templeman put the point more shortly and generally, thus:

> If allegations are made in affidavits by the petitioner and those allegations are *credibly denied* by the respondent's affidavits, then in the absence of oral evidence or cross examination, the judge must ignore the disputed allegation. (Italics supplied)

The second point to note regarding this part of the case is that, it is an elementary proposition sometimes overlooked with resulting confusion and possible injustice that where statements are made by a deponent, based on information and belief these ought not to be looked at at all, unless the court can ascertain not only the source of the information and belief but also unless the deponent's statement is corroborated by someone who speaks from his own knowledge. (See, *In re J.L. Young Manufacturing Ltd. Co.* [1900] 2 Ch. 753, 754 per Lord Alverstone CJ, applied by the old Federal Court in *Cantrans Services (1965) Ltd. v. Clifford* [1974] 1 MLJ 141, 143).

In the present case, the only material relied on by the Borrower Company in support of the plea of illegality aforesaid was an affidavit by Mr. Augustine who claimed to be a representative of the Court appointed Receiver Tuan Syed Md. Amin. Mr. Augustine, of course, was not a party to the transactions and, naturally, had no personal knowledge of the same.

The Judge's approach in evaluating the evidence on affidavit, is reflected in the following passages in his judgment:

First of all, the Judge referred to the allegation made by Mr. Augustine in his affidavit dated 15 February 1993, in these terms:

> Mr. Augustine has alleged that the second offer and the documents executed to support the loan was designed by AMFB to circumvent section 67 of the Companies Act. In a nutshell he is saying that this is self-evident from the letters between the parties dated 30/11/89, 31/7/90, 25/9/90, 4/6/90, 7/6/90 and 18/7/90, coupled with the payment made to LMB's Solicitors of RM4.3 million on the 26th October 1990 and paid by them to MARA the very next day.

Next, the Judge's assessment of this allegation by Mr. Augustine, was as follows:

With respect to Mr. Augustine, what is self-evident is that his allegations are mere insinuations and innuendos which flies in the face of the documents themselves and the realities of the matter viewed from the perspective of AMFB, and their Solicitors.

Admittedly after the first offer was cancelled, AMFB wrote a letter dated 31st July 1990 to LMB in which they referred to the first offer letter and agreed to the money being released in one lump sum for onward transmission by AMFB's Solicitors to MARA (E. 9 Ex. 3A). But one of the signatories of this letter Encik Lim Chin Choy has affirmed in his Affidavit that this letter was mistakenly forwarded to LMB after the facility was withdrawn. That this letter had no contractual force is also evidenced by the fact that there is no evidence that LMB ever signed the duplicate of this letter by way of acceptance and returned it in two weeks as the letter required them to do.

The letters relating to the first offer can and ought to be severed from the consideration of the documents relating to the second offer and the formal contractual documents which resulted from it. What they show beyond all doubt is that AMFB did not enter to this transaction or disburse the moneys until it had received iron-clad assurances in writing from both MARA and LMB and its directors that the said shares had all been transferred and paid for **before** the loan documents were executed.

On the question of the Lender's state of knowledge and the nature of the transaction, the Judge said this:

There is not a shred of evidence that AMFB knew at any material time that the RM4.3 million had been transmitted by LMB's Solicitors to MARA on the 27th October 1990.

Nor is there a shred of evidence that AMFB knew when they executed the loan documents in October that the loan of RM4.3 million was intended to be paid by LMB to MARA and that unless this money was paid. MARA would not transfer its shares and that when the money was in fact paid over on the 27th October 1990, it was paid for the purpose and by way of direct, indirect or collateral consideration for the transfer of the said shares.

Mr. Augustine's allegation of circumvention by AMFB is just that – an allegation without nothing to support it but innuendos and insinuations. Earlier I referred to a possible community of purpose between the incumbent Directors and the Receiver in taking this Defence. If Mr. Augustine's innuendos have any substance, he must mean that the signatories of MARA's letter of 5th October 1990, LMB's Director's resolution dated 30th September 1990, MARA's letter dated 9th October 1990, the loan documents with particular reference to the representations and warranties earlier referred to, and the purpose of this loan, and LMB's notice of drawdown dated 19th October 1990 all told blatant untruths, knowing them to be untrue i.e. that the said shares had not been transferred and/or paid for in full by the 15th September, 1990.

> The fact that Mr. Augustine has very carefully avoided saying so is not irrelevant. The fact that none of them has come forward to depose to any such assertion is the most cogent proof, that there is no real evidence to support Mr. Augustine's assertions.

We would observe that in considering the allegations of illegality, the Judge quite rightly pointed out, that these allegations "were mere insinuations and innuendos which flew in the face of the documents themselves and the realities of the matter viewed from the perspective of AMFB (the Lender) and their Solicitors". (See p. 42 AR).

No attempt had been made by Mr. Augustine to disclose the sources of his information and belief to ground his allegations of illegality and, on this ground alone, the Judge would have been justified in refusing to look at Mr. Augustine's affidavit, applying Lord Alverstaone's famous enunciation of principle in *In re J.L. Young Manufacturing (ibid)* quoted above.

Nevertheless, the Judge did embark upon a most careful examination of the allegations of illegality made by Mr. Augustine and, having done so, we consider he was amply justified in resolving the conflict of evidence on affidavit, in accordance with the principles enunciated in *Eng Mee Yong v. Letchumanan (ibid)*, and coming down strongly in favour of the Lender. We can detect no error in his reasoning when exercising his discretion regarding this part of the case. It would therefore have been a pointless exercise for the Judge to have converted the Originating Summons into a Writ Action. At a trial in Open Court there is no ground for supposing that the quality of Mr. Augustine's testimony would have been superior to his affidavit evidence. Indeed, most probably, cross-examination would made it even clearer that his allegations were virtually worthless as evidence and would thus have led to an unnecessary prolongation of proceedings and increased costs. This ground of appeal therefore fails.

We must next address the alternative submission of the Borrower Company which alleged that the loan transaction and the charge given as security for it, were in contravention of s. 67 of the Companies Act, read with s. 24 of the Contracts Act, and therefore illegal, void and unenforceable.

The Illegality Point: Section 67 Of The Act

Does a breach of s. 67 of the Act, have any civil consequences? This is the key issue in this appeal which can only be determined upon a proper construction of s. 67 read with s. 24 of the Contracts Act.

To put the matter in perspective, the provisions of the Act and the Contracts Act which it is convenient to set out are as follows:

The relevant parts of s. 67 of the Act read as follows:

> (1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, ... in any way purchase deal in or lend money on its own shares.
>
> (3) If there is any contravention of this section, the company is, ..., not guilty of an offence but each officer who is in default shall be guilty of an offence against this Act.
>
> (6) Nothing in this section shall operate to prevent the company *[or any person]* from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable, *[either]* on account of any financial assistance given, *[or under any guarantee entered into or in respect of any security provided]*, in contravention of this section.
>
> (The italicised bracketted words above were inserted by Act A836 which was w.e.f. 10/9/92 and are therefore not applicable to this case.)

The relevant parts of s. 24 of the Contracts Act read as follows:

> The consideration or object of an agreement is lawful, unless –
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above case, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Under s. 2(g) of the Contracts Act, an unlawful agreement is not enforceable.

It is a familiar proposition that courts should be slow to find illegality and strike down commercial transactions. (See, e.g. *St. John Shipping Corporation v. Joseph Rank Ltd.* [1956] 3 All ER 683, 690, 691; *Central Securities (Holdings) Bhd. v. Haron bin Mohamed Zaid* [1979] 2 MLJ 244, 247). But, if Counsel for the Lender is correct in his contention, then he is entitled to succeed, for this is not a court of morals but a court of Law.

We must now embark upon a consideration of the question for decision regarding this part of the case.

The Reasoning Of The High Court

The Judge does not appear to have addressed the question whether a breach of s. 67 has civil consequences in depth and this may well have been because he felt that he was bound by the decision of the Supreme Court in *Chung Khiaw Bank v. Hotel Rasa Sayang* [1990] 1 MLJ 356 where the Bank lost and which we shall be reviewing somewhat extensively.

The Judge gave two reasons for rejecting the submission of Counsel for the Borrower Company based on an alleged breach of s. 67.

In the first place, he said this:

> Even if it were the case that there was some conspiracy afoot between the officers concerned in MARA and Technivest (as suggested by Mr. Augustine) to defeat section 67 of the Companies Act (and I have not seen any real evidence to that effect), it is my view that it cannot affect the validity of the charge which is the subject matter of this action or the other loan document because there is overwhelming evidence before me that AMFB entered into this transaction in good faith and upon the clear representation of all concerned that all the shares had been transferred and fully paid for. This is a civil case and AMFB is entitled to rely upon the estoppels created by these representations. The charge must therefore be held valid.

In the second place, he said this:

> There is another reason why this is so. AMFB's contract was with the Company LMB. Even if there was criminal conduct on the part of the officers concerned in MARA and Technivest and LMB in misrepresenting to AMFB that the shares had been transferred and fully paid for, Section 67(3) of the Companies Act 1965 provides as follows:
>
> > If there is any contravention of this section, the company is, notwithstanding section 369, not guilty of an offence but each officer who is in default shall be guilty of an offence against this Act.
> >
> > Penalty: Imprisonment for two years or ten thousand ringgit or both.

> Since LMB was not guilty of any offence this contract cannot be tainted with any illegality from that quarter. I have already said that so far as AMFB is concerned, there is no evidence of any criminal conduct on its part or on the part of its servants or agents. Actual knowledge has to be proved on their part to the effect that they knew that the representations made were false. There is not a shred of evidence before me to this effect.

The Estoppel Point

Before proceeding further, we would say, that if as a matter of construction, a breach of s. 67 has civil consequences, then we regret we are unable to agree with the Judge that a plea of estoppel could salvage the case for the Lender.

The case of *Re a Bankruptcy Notice* [1924] 2 Ch. D. 76, at 96 (per Atkin LJ) shows that there is, in most cases, no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction on which he is being sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel. This point is fully discussed in the Privy Council case of *Kok Hoong v. Leong Cheong Mines Ltd.* [1964] 1 All ER 300 (per Viscount Radcliffe especially at pp. 307 to 309 C). The case of *Kan Yeow Weng v. Keng Soon Motor Finance* [1962] MLJ 391 (per H.T. Ong J at p. 394 B) can be seen as an application of this principle.

In our view, for reasons which will appear later in this judgment, sub-s. 6 of s. 67 of the Act is intended for the protection not only of the company but also, *inter alia*, of other creditors who may have dealings with the borrower. In such a situation, the section overrides an estoppel, or to put it another way, the plea of estoppel cannot be set up in the face of the sub-s.

Section 66 Of The Contracts Act

Similarly, if a breach of s. 67 of the Act has civil consequences, then the fact that the financier had no knowledge of the alleged illegality and the true nature of the transaction will not convert a void, illegal and unenforceable transaction into a legal one. (See, s. 24 Contracts Act and *Re Mahmoud and Ispahani* [1921] 2 KB 716). Though, of course, in such a situation, it would be possible for the financier to recover under s. 66 of the Contracts Act, 1950 which is a restitutionary provision having no direct counterpart in English Law. Section 66 provides:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

The "advantage" under the section would, no doubt, include a loan, thus enabling a financier, with no knowledge of the illegality to recover. (See, *Menaka v. Lum Kum Chum* [1977] 1 MLJ 91).

Professor Visu Sinnadurai in his helpful work on the *Law of Contracts in Malaysia and Singapore,* 2nd Edn. has neatly summarised the effect of s. 66 thus:

> ... section 66 is a restitutionary provision and any remedy granted under the section is not based strictly on contract. The general principle under English law is that the courts will not enforce nor grant any remedy under an illegal contract. However, one of the main exceptions to this rule is that an innocent party may obtain certain remedies, whereas no remedy is available to a guilty party. Section 66 is a wide provision which has no direct parallel under English law. English cases are, therefore, not relevant in determining the scope of section 66. If the agreement 'is discovered to be void', section 66 will apply. 'Discovered' has been interpreted to mean that the illegality must not have been known to the party seeking restitution under section 66 at the time the agreement was made. In other words, no remedy will be granted to the guilty party under section 66. In each case, therefore, the courts have to examine the facts of the case to determine whether the party was aware of the illegality at the time the agreement was entered into.

Section 67(6) Of The Act

But, to revert, the problem we have to grapple with here, is a question of construction of s. 67 of the Act, in particular, whether the effect of sub-s. 6 of s. 67 is to save a transaction which contravenes s. 67(1), from invalidity?

It would, therefore, be convenient, if we next directed our attention to the decision of the Supreme Court in *Chung Khiaw Bank v. Hotel Rasa Sayang (ibid).*

The Decision Of The Supreme Court In Chung Khiaw Bank Reviewed

In *Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang (ibid),* the question whether a breach of s. 67 of the Act has civil consequences, arose acutely for decision and, therefore, we are obliged to undertake a review of it.

The Judgment Analysed

The grounds upon which the Supreme Court held against the Bank may be stated thus:

Broadly stated, the facts there were that the bank gave a loan to a company to purchase shares in the hotel on the security of, *inter alia*, a registered charge over the hotel's land. The company having defaulted the bank commenced proceedings to recover the loan.

The two questions for determination were whether the transaction was in contravention of sub-s. (1) of s. 67 and, if so, whether that had civil consequences having regard to sub-s. 6 of s. 67.

It identified the crucial issue as being the effect of s. 67 of the Act. It referred to the judgment of Chang Min Tat J. in *Wai Hin Tin Co. Ltd. v. Lee Chow Beng* [1968] 2 MLJ 251, as a good starting point, where it was held that the company could not recover a loan the avowed purpose of which was to assist the defendant to pay for the purchase of shares in itself – an unlawful transaction under the relevant legislation. This was a case decided under the ss. 47 and 48 of the Companies Ordinance (No. 49 of 1940) which did not carry a saving provision such as the present sub-s. 6 of s. 67 and Chang Min Tat J. did make the observation that the civil consequences would have been different had there been a saving provision.

The Court first considered the question whether the transaction breached sub-s. (1) of s. 67 and answered this question against the Bank, on the ground that sub-s. (1) of s. 67 prohibits any financial assistance given directly or indirectly for the avowed object of dealing in the shares of a company – a widely worded prohibition, derived from the rationale for the rule in *Trevor v. Whitworth* [1887] 12 App. Cas. 409 a view adopted by the old Federal Court in *Mookapillai & Anor. v. Liquidator, Sri Saringgit Sdn. Bhd. & Ors.* [1981] 2 MLJ 114, where the prohibition was extended to a vendor of shares. The Court decided that there had been a breach of sub-s. (1) of s. 67.

Next, the Court considered the question what is "the effect on a contract where it is prohibited by statute"? This being a general question the Court first examined the position at Common Law.

After referring with approval, to the English case of *Phoenix Insurance v. Adams* [1987] 2 All ER 152 which in turn followed a well known passage in the judgment of Parke B in *Cope v. Rowlands* 150 ER 707, and then to the judgment of the High Court of Australia in *Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia Ltd.* [1978] 139 CLR 410, the Court concluded (at p. 361 col. 1 E, F) that "it may be stated as a general principle that a contract, the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable unless the statute saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself".

To reinforce this view, the Court then made more than a passing reference to the Privy Council case of *Menaka v. Lum Kum Chum* [1977] 1 MLJ 91, a moneylending case which raised an issue of illegality for breach of s. 8(c) of the Moneylender's Ordinance which related to licensing requirements.

The Court then referred, with approval, to the principle illustrated by that case, that where it is shown that a contract is void because it is prohibited by statute, courts, as a general rule, should not lend their assistance to enforce the contract.

The Court then referred to a passage in the judgment in *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1993] 1 All ER 513, where Lord Wright cautioned as to the danger of:

> ... the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.

But, the Supreme Court added, that merely reflected the position at Common Law.

The Court then directed its attention to s. 24 of the Contracts Act, 1950, (which it reproduced) and noted that it might well have had its origins in an old Common Law principle, but that as it is a statutory provision, the Courts in this country are bound to give effect to it. Consequently, the trend shown in Common Law countries to be slow in striking down illegal contracts was untenable in this country.

The Court next referred to s. 3 of the Civil Law Act, 1956, which directs the courts, *inter alia*, to apply the Common Law of England in force as at 7 April 1956 (for the Malay States) only in so far as the circumstances permit and save where no provision has been made by statute law. This meant, so the Court said, that the development of the Common Law after 7 April 1956 (for the Malay States), was entirely in the hands of the Courts in this country, and so, "we cannot just accept the development of the Common Law in England".

Having said that, the Court then considered the submission of Counsel for the Bank that because the second limb of sub-s. 6 of s. 67 of the Act provides that the section shall not operate to prevent the company from recovering "any amount for which it becomes liable", the company's liabilities to third parties were not affected by the prohibition in the section. This submission failed solely on the ground that having regard to the words "recovering the amount of any loan made in contravention of this section", it followed, that "the scope of s. 67(6) is confined only to the protection of the company and no one else".

The Court went on to say, that what was important to note was that the bank had knowledge of the illegality and the nature of the transaction.

We shall consider each of the grounds upon which the Supreme Court in *Chung Khiaw Bank* arrived at its decision.

To recaptulate, in summary, the crux of the reasoning of the Supreme Court in *Chung Khiaw Bank* would appear to be this: a transaction prohibited by s. 67 of the Act is void and illegal because, in this country we are bound to give effect to s. 24 of the Contracts Act. The submission by Counsel for the Bank, that because of the words "for which it becomes liable" appearing in the second limb of sub-s. 6 of s. 67, the company's liability to third parties remains unaffected by the prohibition contained in that section, was untenable because the section gave protection only to the company and no one else. Lastly, it was important to note that at all material times the Bank had knowledge of the illegality and the nature of the transaction. In the result, the Bank lost.

Our Comments On The Judgment

Introduction

We regret we find it difficult to agree with the reasoning of the Court in *Chung Khiaw Bank* for reasons which follow.

As to the point concerning s. 24 of the Contracts Act, it is obvious that this section was taken from s. 23 of the Indian Contract Act, which in turn was inspired by the Common Law of England, and should therefore be construed in that light. (See, *Gherulal Parakh v. Mahadeodas* [1959] Supp. S.G.R. 406; [1959] ASC 781, 797). We have noted the cogent comments by Professor V. Sinnadurai in his *Law of Contracts in Malaysia and Singapore* (2nd Ed., pp. 357-366) and read with interest the analysis of the cases on the approach of the Courts in interpreting statutes in the area of statutory illegality by Varsha L. Doshi in her recent book on *Restitutionary Remedies in Illegal Agreements* (1998) pp. 45-55.

Is The Trend In Common Law Countries To Be Slow In Striking Down Commercial Contracts Applicable Here?

It is true that s. 3 of the Civil Law Act 1956, directs our courts to apply the Common Law of England in force at the date of its coming into effect; that is 7 April 1956, only in so far as the circumstances permit and save where no provision has been made by statute law. We therefore heartily agree with the Court in *Chung Khiaw Bank* that the development of the Common Law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. But, having said that, we consider that the trend shown

by the courts in Common Law countries to be slow in striking down commercial contracts on the ground of illegality is a sensible one, which we should follow thus incorporating it as part of our Common Law.

Indeed, twenty years ago, this is precisely what Raja Azlan Shah, CJ (now H.R.H. the Sultan of Perak) had done in *Central Securities (Holdings) Bhd. v. Haron bin Mohamed Zaid* [1979] 2 MLJ 244. Here is what his Lordship said (at p. 247), when speaking for the old Federal Court:

> We bear in mind the much quoted warning of Devlin J in *St. John Shipping Corporation v. Joseph Rank Ltd.* [1956] 3 AER 683, 690, 691) against a too ready assumption of illegality or invalidity when dealing with statutes regulating commercial transactions.

We would observe, that two points are noteworthy about the Central Securities case; first the dispute there arose out of a sale and purchase transaction of shares – an event which occurred on 12 March 1975 – in other words, long after the critical date 7 April 1956, referred to in the Civil Law Act, yet we find Raja Azlan Shah applying the Common Law trend in England and second, the *Central Securitie*s case was not referred to by the Court in *Chung Khiaw Bank.*

The General Rule At Common Law

It is well settled that at Common Law, a contract or transaction in breach of a statutory prohibition and an associated contract is, in general, void for illegality even though the statute is silent as to its consequences and merely inflicts a penalty on the wrongdoers (See, *Menaka v. Lum Kum Chum (ibid)* at 94; *Phoenix Insurance v. Adams (ibid)*) but this is subject only to any contrary intention manifested by the statute. (See, *Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia Ltd. (ibid)*).

The next topic to be logically considered is the key issue: whether sub-s. 6 of s. 67 of the Act excludes the operation of s. 24 of the Contracts Act?

Does Section 67(6) Of The Act Exclude The Operation Of Section 24 Of The Contracts Act?

It will be recalled that, in *Chung Khiaw Bank,* the submission advanced by Counsel for the Bank that the effect of the second limb of sub-s. 6 of s. 67 of the Act, which provides that the section shall not operate to prevent the company from recovering "any amount for which it becomes liable" and therefore the company's liability to third parties remains unaffected by the prohibition in the section, was rejected by the Supreme Court *solely* on the *assumption* that the scope of sub-s. 6 of s. 67 was confined to the protection of the company and no one else. Having so held, perhaps understandably, the Court made no attempt to actually construe the all important five words "for which it becomes liable" appearing in the sub-section.

With respect, we find it difficult to agree with the *ex carthedra* pronouncement of the Supreme Court that the scope of sub-s. 6 of s. 67 is confined to the protection of the company and no one else for it is flatly contradicted by a wealth of respectable authority. It will suffice if we refer to just a few of these cases.

In *Wallersteiner v. Moir* [1974] 3 All ER 217, 255 Scarman LJ (as he then was) held (at p. 255 a) that the section (s. 54 of the Companies Act 1948, the counter part of our s. 67) must have been enacted to protect the company funds and the interests of shareholders *as well as creditors.*

In *Skelton v. South Auckland Blue Metals Ltd.* [1969] NZLR 955, Woodhouse J ruled that the equivalent New Zealand section was aimed at protecting the interests of contributories *and creditors.*

In *Re Ferguson; ex p. Thome (In Liq.)* [1969] 14 FLR 311, 316 we find Gibbs J saying (at p. 316) that the equivalent Australian section was not enacted for the protection of the company but was passed in the *public interest generally.*

In his book *"Principles of Corporate Law"* 6th Ed. (1992) at p. 226 para 867, Ford says with reference to the provision contained in s. 205 (Aust.) prohibiting a company giving financial assistance for the purpose of acquisition of its own share or shares of its holding company, that "the section reinforces the case law that a company's resources are to be used only for proper corporate purposes: *Skelton v. South Auckland Blue Metals (ibid)*. It is a protection of a *company's creditors* and minority shareholders against deployment of a company's financial resources in such a way that the company gives up value in exchange for an obligation or repayment on the part of the controller which may turn out to be worthless if the controller becomes insolvent." (italics added)

Denning LJ's definition of the ordinary meaning of the word "liable" in *Littlewood v. George Wimpey & Co. Ltd.* [1953] 2 All ER 915, 921 is often quoted. In that case, his Lordship said: "... the ordinary meaning of the word 'liable' in the legal context is to denote the fact that a person is responsible at law."

The *Oxford Companion to Law* supports Lord Denning, and in fact, makes the meaning of the word "liable" even clearer. What it says is this:

> a person is said to be under a liability when he is, or at least may be, legally obliged to do or suffer something.

"Liable" is generally regarded by purists as a word of modern English and not having any existence in ancient documents. It means very little more than "under an obligation", so said Kekewich J in *Re Chapman* [1896] 1 Ch. 323 and shortly after that the same learned Judge in *Re Hill* [1896] 1 Ch. 962, said it "must mean, to some extent, 'under an obligation'".

Osborn's Concise Law Dictionary (8th Edn.) at p. 200 states that 'liable" means "subject to or incurring legal liability".

Looking at the second limb of sub-s. 6 of s. 67 ourselves, we consider that the section was enacted for the protection of the company's funds and the interests of shareholders *as well as creditors* and, we would add, the public generally.

That being so, we can think of no valid reason why, its operation should be limited only to enabling a company to recover loans granted by it, as was held by the Supreme Court in *Chung Khiaw Bank.*

Another point to which we should like to direct attention is that in arriving at its conclusion that the prohibited transaction concerned was illegal, void and unenforceable, the Court in *Chung Khiaw Bank* was unduly swayed by certain English authorities. In particular, we should like to point out that these English cases were really of little assistance since the relevant legislation on which they were decided did not contain a saving provision equivalent to our sub-s. 6 of s. 67 of the Act. Yet another difference was that the prohibition under the relevant English legislation, imposed criminal liability not only on officers of the company but also on the company itself *whereas,* under our s. 67 criminal liability is imposed not *on* the company but only on officers of the company – a point on which the Court below laid much stress, and justifiably so.

In view of the differences referred in the relevant comparative legislation and our legislation, the reliance placed by the Supreme Court in *Chung Khiaw Bank* on English cases such as *Scott v. Brown Doering, McNab & Co.*, [1942] 1 All ER 224, *Selangor United Rubber Estates v. Cradock* [1968] 2 All ER 1073, *Heald v. O'Connor* [1971] 1 WLR 497; *Wallersteiner v. Moir* [1974] 3 All ER 217 and *Carney v. Herbert* [1985] 1 All ER 438, was open to some justifiable criticism. (See, e.g. the well researched article by Miss Lai Ching Sum entitled *"Section 67 of the Companies Act: a Hornet's Nest?"* [1992] 2 MLJ xi).

Next, we must refer to the case of *Victor Battery Co. Ltd. v. Curry's Ltd.* [1946] Ch. D 242, the reasoning of which the Supreme Court did not follow in *Chung Khiaw Bank.*

In *Victor Battery* it was held that mortgage of a company's assets was valid and enforceable although it was given as security for a loan to the company which the lender knew would be used to assist some one to acquire shares in the company.

In *Curtis's Furnishing Stores Ltd. (In liquidation) v. Freedman* [1996] 2 All ER 955 Cross J followed *Victor Battery*, though in *Selangor United Rubber Estates Ltd. v. Cradock (No. 3)* [1968] 2 All ER 1073 at 1153, *Victor Battery* was doubted and indeed, in *Heald v. O'Connor* [1971] 2 All ER 1105, *Victor Battery* was disapproved and not followed.

We must, however, interpolate to add, that in *Selangor United Rubber Estates Ltd. v. Cradock (No. 3) (ibid)* in considering s. 54 of the (English Companies Act 1948), which prohibits a company from lending money to purchase its own shares, Thomas J *did* say this:

> If such a loan is valid, then it seems to me that it can only be on the ground that the section itself established that, despite its declaring it unlawful for a company to give by means of a loan financial assistance for the purchase of shares in the company, yet the ordinary consequences of such illegality are not to follow. Statute, of course, could so provide expressly or by implication.

A decade later, in *Yango Pastoral Co. Pty. Ltd. & Ors. v. First Chicago Australian Ltd. (ibid)* – a case which has rightly been regarded as one of the most important Common Law decisions in the field of statutory illegality – we find Gibbs ACJ saving much the same thing (at p. 413):

> ... it is possible for a statute in terms to prohibits a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable.

Having said that, we are aware that Mr. Gower in his highly regarded book on the *Principles of Company Law* (5th Ed) at p. 237, considered that *Victor Battery* was wrongly decided and went as far to describe it as "heretical". However, in our view, in so far as sub-s. 6 of s. 67 of the Act enables any person to recover any moneys in respect of a security in contravention of the section, the sub-section appears to be a statutory recognition of the rule in *Victor Battery* wherein it was decided that an illegal security given by a company to finance the purchase of its own shares contrary to s. 45(1) of the Companies Act, 1929 (U.K.) being the equivalent of our s. 67(1) of the Act, was not avoided. We would add, however, that the Companies Act, 1929 (U.K.) did not have a provision equivalent to our sub-s. 6 of s. 67. It follows, that even if *Victor Battery* was wrongly decided, it matters not for in our view the principle enunciated therein has been statutorily recognised in sub-s. 6 of s. 67. It is a maxim of the Law that the duty of the Courts is merely to give effect to the will of Parliament as expressed in the Law.

Looking back, if we may say so, with great respect, perhaps the most important point to note regarding *Chung Khiaw Bank* is that as a result of failing to actually construe the five words "for which it becomes liable" in sub-s. 6 of s. 67, the Court, took a wrong turning and placed undue stress on the provisions of s. 24 of the Contracts Act and held that because the Bank had knowledge of the illegality and the nature of the transaction, at the material time, the Bank's claim failed.

Lest we be accused of an oversight, mention should be made of the Supreme Court decision in *Kidurong Land Sdn. Bhd. & Ors. v. Lim Gaik Hua & Ors.* [1990] 1 MLJ 485, where the Court followed uncritically certain Commonwealth authorities on financial assistance and concluded, without discussion, that a prohibited transaction would be unenforceable and void. We do not, therefore, find this case of much assistance.

Conclusion

In our view, sub-s. 6 of s. 67 creates an important exception to s. 24 of the Contracts Act by allowing recovery under an illegal contract, thereby excluding the operation of s. 24. A good illustration of the application of such a provision is found in the well known Privy Council case of *Batu Pahat Bank Ltd. v. Official Assignee* [1933] AC 691, per Lord Russell at pp. 238-239. In our view, the words of Lord Russell would apply equally to s. 67 of the Act. See also, *Tan Lay Teck v. Sarjana Sdn. Bhd. & 4 Ors.* [1997] 3 AMR 2718, at p. 2757, per Augustine Paul JC, as he then was, which is precisely in point.

With the most profound respect, we consider that *Chung Khiaw Bank* was decided *per incuriam* because of its failure to actually construe, the all important five words "for which it becomes liable" appearing in sub-s. 6 of s. 67.

In our view, therefore, in a situation where a company obtains a loan from a financial institution on security of a charge over its land for the purpose enabling an intending purchaser to purchase shares of the company, the company's liability to the financial institution both in respect of the loan and the security remains unaffected, having regard to the saving provision in the second limb of sub-s. 6 of s. 67 of the Act.

Consequently, the Borrower Company's allegations, even if true, would not provide the existence of "cause to the contrary" within the meaning of s. 256(3) of the Code.

Personal Liability Of Receiver For Costs

There is a final point. We note that the Judge made an order that the costs arising out of and incidental to these proceedings from the date of Mr. Augustine's First Affidavit dated 19 November 1992 up to and including the date of his judgment be taxed and that the Appellant ("the Borrower Company"), the Interim Receiver and Mr. Augustine be jointly and severally liable therefor. He further ordered that "the Respondent alone shall be liable to the Plaintiff for the taxed costs of these proceedings from its inception up to 19 November 1992 and for the extraction of the order of this Court and thereafter."

The Judge went on to say, that he had made the Interim Receiver and Mr. Augustine personally liable for the relevant portion of the proceedings because it was his view that accusations of criminal conduct should not be made unless there is cogent evidence to support them. The standard of proof, he remarked, was very high and as both these individuals had the advantage of legal advisers to assist them they should have been aware of the consequences of making the kind of imputations they had put forward without proper evidence to support them.

It is, of course, clear Law that costs being in the discretion of the Court, a receiver may be ordered personally to pay costs incurred by reason of his misconduct or neglect in the discharge of his duties. (See, *Ex p. Brown,* [1888] 20 QBD 693; 36 WR 303). A receiver may be, and frequently is directed to bear personally the costs of unnecessary applications or appearances (see, e.g. *O'Kelly v. Gregg* [1838], Jo & Car. 76; *Re Doolan* [1843], 2 Con. & Law 232; *Payne v. Lamb* [1844], 8 I. Eq. R. 517; *De Montmorency v. Pratt* [1849], 12 I. Eq. R. 411; *Delacherois v. Wrixon* [1850], 2 Jr. Jur. 66). He will not, however, be held personally responsible if he has honestly done his best and failed (see, *Kerr on Receivers and Administrators,* 17th, Ed. p. 210).

However, having regard to the circumstances of the case as a whole, the grounds upon which the Interim Receiver and Mr. Augustine were ordered personally to pay costs incurred, could be disputed. The fact that they had relied on professional legal advice in opposing the Originating Summons is a factor which should have told in their favour rather than against. (See, *Bunt v. Hallinan* [1985] 1 NZLR 450, 462, para 1 CA which provides a close analogy). It would, of course, be different if they had opposed the Originating Summons *contrary* to the advice of their legal advisers. But, of course, there was no evidence of this. Indeed, all the evidence was the other way.

For these reasons we would set aside both the orders requiring the Interim Receiver and Mr. Augustine to be personally liable for costs in respect of the relevant portion of the proceedings.

The Result

For the reasons stated, we consider that the decision of the Judge that the Borrower Company had failed to satisfy the Court as to the existence of "cause to the contrary" within the meaning of s. 256(3) of the Code, was right and we accordingly affirm the same.

We therefore remit the Originating Summons to the High Court, Shah Alam, with a direction to grant the prayers therein, including the prayers for sale of the Land and to make such further or other consequential orders and directions as are required under s. 257(1), (2) and (3) of the Code.

Consequently, the appeal is dismissed, save and except that the orders as to costs aforesaid against the Interim Receiver and Mr. Augustine are, as we have said, set aside. The Borrower Company must pay the costs of this appeal to the Lender. Deposit to the Lender to account of taxed costs.

Finally, we should like to record our appreciation of the able manner in which the appeal was argued by Counsel on both sides.